IN THE

Supreme Court of the United States

October Term, 1958

No. 34

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General, State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE APPELLANT

ROYAL W. FRANCE,
154 Nassau Street,
New York 37, New York,

HUGH H. BOWNES,
Laconia, New Hampshire,
Attorneys for Appellant.

INDEX

Citations

IN THE

Supreme Court of the United States

October Term, 1958

No. 34

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General, State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF FOR THE APPELLANT

Opinions Below

The first opinion of the Supreme Court of New Hampshire was rendered on February 28, 1957 (R. 94-106) and modified on March 27, 1957 in an order denying appellant's motion for rehearing (R. 114-115). As modified, the opinion is reported at 100 N. H. 436, 130 Atl. 2d 278. The opinion of two justices, dissenting in part, is similarly reported (R. 106-109). A second motion for rehearing in the State Supreme Court was denied on July 9, 1957 without opinion (R. 120).

Following this Court's *per curiam* opinion at 355 U. S. 16 (R. 122-123), the Supreme Court of New Hampshire rendered another opinion on November 15, 1957 (R. 128-130), a single judge dissenting, which is reported at 101 N. H. 139, 136 A. 2d 221.

There was no opinion in the Superior Court of the State which merely made brief "rulings and findings" (R. 2).

Jurisdiction

The judgment of the Supreme Court of the State of New Hampshire was entered on November 15, 1957 (R. 130). The amended notice of appeal to this Court was filed in the State Supreme Court on January 2, 1958 (R. 130). Subsequent to appellee's motion to dismiss which was opposed by appellant, this Court entered an order on April 7, 1958 noting probable jurisdiction (R. 134). The jurisdiction of this Court rests on 28 U. S. C. § 1257(2).

Constitutional Provisions and Statutes Involved

The United States Constitution:

Article I, § 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> • • •

Article VI:

> • • •
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> • • •

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of New Hampshire:

The Statutes involved are the Subversive Activities Act of 1951, N. H. Laws, 1951, c. 193; now N. H. Rev. Stat. Ann., 1955, c. 588, §§ 1-16; Joint Resolution Relating to the Investigation of Subversive Activities, N. H. Laws, 1953, c. 307 as extended, N. H. Laws, 1955, c. 197. The pertinent provisions of these statutes are reproduced in the Appendix, *infra*, pages 23 to 35.

Questions Presented

(1) Whether appellant's conviction for contempt under the aforesaid statutes for refusing to produce his correspondence with guest lecturers and the names of his guests does not violate his rights of free speech and association under the First and Fourteenth Amendments.

(2) Whether appellant's conviction was not a denial of due process under the Fourteenth Amendment by reason of:

(a) the vagueness of the said statutes,

(b) the reliance of the Court below upon "subversive" lists of the Attorney General of the United States and of the House Committee on Un-American Activities, and

(c) the irrelevancy of the said correspondence and names to any subject which appellee was entitled to investigate.

(3) Whether the subpoenas duces tecum were not so unreasonable and arbitrary as to violate appellant's rights under the Fourth and Fourteenth Amendments.

(4) Whether the said statutes had not been superseded by federal legislation under Article VI of the Constitution.

(5) Whether indefinite incarceration of appellant until such time as he subordinates to the order of the Court his conscientious scruples against informing does not constitute cruel and unusual punishment and a denial of due process under the Eighth and Fourteenth Amendments.

Statement of the Case

Appellant, Willard Uphaus, is the Executive Director of New Hampshire World Fellowship Center, Inc., herein referred to as World Fellowship. This is a pacifist organization, organized as a charitable corporation under New Hampshire law, which operates a summer camp in

that state. It is "a religious-motivated movement in the highest sense which seeks to bring together for fellowship and discussion the representatives of all faiths to the end that there may be peace, brotherhood and plenty for all men, women and children. It is a movement world-wide in its purpose" (R. 95; see also R. 70).

World Fellowship maintains accommodations for the public and makes available to them guest lectures on topics of contemporary interest in the area of human relations (R. 95). As appellant testified:

> "Generally they fitted into a program and came to speak on questions that I had suggested; or if they were celebrated ministers or lawyers, they just talked of their life's experiences. They talked sometimes without a closely expressed topic. Sometimes they just sat down for an evening around the fire and expressed their—told stories of their lives, their interest and their problems" (R. 53).

In 1953, appellee began an investigation under the 1951 Act Relative to Subversive Activities and the 1953 "Joint Resolution Relating to the Investigation of Subversive Activities" (R. 10). See *Sweezy* v. *New Hampshire*, 354 U. S. 234. Appellant was one of the persons subpoenaed and interrogated by appellee on the ground that he and some of his guest speakers were connected with organizations described as subversive by the United States Attorney General and by the House Committee on un-American Activities (R. 6, 17, 18, 20, 34, 55, 66, 95, 96). Appellee claimed the right "to find out whenever there were any Communist, former Communist, Communist sympathizers or fellow travelers in this state, at any time, to find out what they are up to— whether they are talking behind curtains about overthrowing the government or whether they are having philosophical discussions" (R. 19).

Although testifying fully about himself and his beliefs and associations, appellant declined to produce pursuant to subpoenas deuces tecum the names of guests at the camp,

the names of its non-administrative employees such as cooks and ground-keepers and his private correspondence with or concerning the guest lecturers (R. 94).

Thereupon, appellee filed a petition with the Superior Court of Merrimack County, New Hampshire, to compel the production of this information. Such a petition, under New Hampshire practice, leads to a judicial hearing, independent of the administrative one before the Attorney General, in which the witness is again questioned and the Court after ruling upon pertinence and privilege may direct compliance and enforce its order by the contempt power (R. 8).

Appellant was called as a witness by appellee and again testified freely with respect to his own associations (R. 95-96). As the Court below stated:

> "The defendant in the course of the proceedings has placed no reliance upon the Fifth Amendment to the Constitution of the United States, or the Fifteenth Article of the New Hampshire Bill of Rights. He testified that he was not a Communist and never had been, and that none of the speakers at the Center, or its guests, were to his knowledge Communists, although he was aware of the connections held by many of them and frankly conceded his own activities in past years. He testified that at no time at the Center was there any advocacy of overthrow of the government by force or violence. A teacher by profession, and holding a Ph.D. degree in religious education from Yale, he described himself as a pacifist, and believer in a 'form of Christian social society.'" (R. 96)

In addition, letters of three of his pastors in the Methodist Church were read into the record describing him in such terms as "a dedicated Christian, earnestly seeking to find expression for the Christian ideals of love and justice in the modern world" (R. 22-24).

One cannot read appellant's uncontradicted testimony as to his beliefs and motivations without realizing that here is an unusual man who not merely professes belief in the great principles of the Sermon on the Mount but who strives earnestly to translate them into action in his own life. From young manhood, a Y.M.C.A. Worker, an active member of the Methodist Church, the acquirer of a doctorate in religion at Yale University and then a teacher of religion at a midwestern college and later at Yale, the application of the principles of religion to life was his uppermost idea. It led him to dedicate himself to the betterment of understanding between individuals, groups and nations. It led him into active participation in groups like the American Peace Crusade and the Committee for the Protection of the Foreign Born, organizations which the Attorney General deemed subversive and to attendance at a peace conference in Warsaw where he advocated peaceful co-existence. All these activities he discussed and explained as part of his way of life. It was these activities, not communism or advocacy of violent overthrow, which led to the appellee's investigation.

After answering all questions concerning himself, his activities and those carried on at World Fellowship, appellant declined to produce the guest lists, the names of non-administrative employees and his correspondence with the guest lecturers (R. 50), on the basis of both conscience and constitutional right (R. 7, 12). "I have been moved first" he said "by my religious convictions, by my inner conscience, by the direct teachings of the Bible that it is wrong to bear false witness against my brother" (R. 14).

Appellant and his counsel noted that appellee had published the names of innocent people who had been guests, to their injury (R. 7, 9, 15); that the questions were not pertinent (R. 9-10, 13, 25, 29, 48, 57, 65, 68, 97) and that the inquiry violated appellant's constitutional rights of privacy, association and freedom of speech (R. 13-15, 28).

The Superior Court overruled appellant's objections (R. 88-89), denied his motion to dismiss the proceedings and directed him to produce the guest list (*ibid.*). Upon his refusal, appellant was adjudged in contempt of court and sentenced to imprisonment until he should purge himself of contempt (R. 88, 90). The Superior Court also ruled that appellant was not required to produce the names of his non-administrative employees (R. 51, 72, 95). It did not rule upon appellant's duty to produce his personal correspondence with and concerning the guest lecturers. It transferred that matter, without ruling, to the Supreme Court of New Hampshire (R. 88).

Upon exceptions duly filed, the case was heard on appeal in the Supreme Court of New Hampshire. That Court resolved the constitutional issues against appellant in its opinion of February 28, 1957 (R. 94). It relied repeatedly upon its earlier decision in *Wyman* v. *Sweezy*, 100 N. H. 103, later reversed by this Court in *Sweezy* v. *State of New Hampshire*, *supra* (R. 97, 100, 103-104).

The state Supreme Court held that this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497 did not render invalid the subpoenas duces tecum served upon appellant (R. 97-98). It rejected appellant's arguments with respect to his constitutional rights and lack of pertinency, again upon the basis of its decision in *Sweezy* (R. 103). In this connection it relied upon the connections of appellant and some of the guest speakers with organizations on the United States Attorney General's list (R. 103, 115). It held that appellant was required to produce both the names of the guests and the correspondence with guest speakers. It remanded the case so that appellant might be committed until he should purge himself of his contempt (R. 95, 109).

An appeal was taken to this Court. Upon the filing of a jurisdictional statement, this Court vacated the judgment below, remanding the cause to the Supreme Court

of New Hampshire "for reconsideration in light of *Sweezy* v. *New Hampshire*, 354 U. S. 234" (R. 122-123). Thereupon, that Court, one judge dissenting in part, rendered the decision herein appealed from, concluding with the following statement:

> "We have again reconsidered our opinion in the light of the Supreme Court's decision in the *Sweezy* case and we adhere to our original ruling in *Wyman v. Uphaus, supra.*" (R. 129)

Summary of Argument

I

The order below was made in the same investigation which resulted in this Court's decision in *Sweezy* v. *New Hampshire*, 354 U. S. 234, and the decision therein is controlling here. The order abridged appellant's constitutionally protected rights of association, speech and belief under the First and Fourteenth Amendments. The claimed justification consists principally in associations with organizations on the so-called "subversive lists". Despite similar associations by Sweezy, this Court found no "exigent and compelling" reason for compelling Sweezy to give the requested information.

The demand for the production of the lists of guests and the correspondence with speakers was not relevant to the subject which appellee claimed to be investigating, namely subversive activities under the Act of 1951. Since appellant had denied either membership in the Communist Party or the advocacy of violence in the correspondence or lectures, there was no fair likelihood that the production of the material subpoenaed would do more than interfere with both privacy and political associations and expression.

II

The 1953 resolution under which the inquiry was made was too vague to show that the legislature desired the information subpoenaed herein. *Sweezy* v. *New Hampshire, supra.* Since the information related to the exercise of constitutionally protected freedoms of association and speech, this absence of clear authority and legislative control deprived appellant of due process of law.

III

The investigation herein was based upon New Hampshire's 1951 sedition law. That statute is expressly predicated upon the existence of an international communist movement whose objective is the overthrow of the United States—not New Hampshire alone. Hence, the statute and the resulting investigation thereunder are invalid by reason of supersession under *Pennsylvania* v. *Nelson,* 350 U. S. 497.

IV

The order below would require appellant's indefinite incarceration until his compliance with it. Since appellant's refusal was founded upon conscientious scruples against injuring others, and since the State was inquiring into the exercise of fundamental freedoms of association and speech, the order itself was unreasonable and constituted cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

ARGUMENT

I

The order below violated appellant's rights of association, speech and belief under the First and Fourteenth Amendments.

The problem presented by this case is identical with that in *Sweezy* which we believe to be controlling. Both investigations were allegedly authorized by the same resolution intended to implement the *New Hampshire Act Relative to Subversive Activities.* In each the Attorney General was inquiring into the exercise of such constitutionally protected freedoms as speech, belief and association. In each the principal excuse for the inquiry was the connection of the witness and others with organizations on "subversive" lists compiled by the United States Attorney General or the House Committee on Un-American Activities.* (R. 96, 99, 100, 103). Each appellant testified that he had never been a member of the Communist Party and had never advocated the forcible overthrow of the government.

Professor Sweezy had declined to answer two kinds of questions—(a) the contents of a lecture at the University of New Hampshire—and particularly whether it included advocacy of Marxism; (b) the activities of other persons with the Progressive Party and, in one instance, with the Communist Party. *Sweezy* v. *New Hampshire*, 354 U. S. 234.

---

*The reliance of the Court below upon (a) the distribution at World Fellowship of political literature and appellant's attendance at a conference in Warsaw upon the invitation of a man with a Communist reputation merely emphasizes the state's attack upon freedom of association and speech, and its reliance upon the principle of guilt by association.

This Court, reversing the judgment of a unanimous state court, upheld his refusal to answer such questions. The two opinions supporting the reversal found that the State's interest did not justify the abridgement of constitutionally protected freedoms of speech and association. This Court did not regard associations with alleged "subversive" organizations sufficient reason to abridge the appellant's "inviolability of privacy." This was consistent with this Court's recognition in *Wieman v. Updegraff*, 344 U. S. 183 of the limited purpose of such lists—viz., to determine fitness for governmental employment.

The position of the instant appellant is even stronger than that of Professor Sweezy. Appellant answered *all* questions with respect to himself (R. 4); disclosed the names of his guest lecturers (R. 96); testified that he did not know of their ever having been Communists (R. 39); and that the correspondence contained no suggestion that "they discuss the overthrow of government by force and violence, or that they discuss Marxism or Leninism" (R. 54). There was no correspondence with the Communist Party (R. 73). The questions in dispute relate exclusively to the names of guests and to correspondence with lecturers; hence, the unwillingness of the trial court herein to decide appellee's right to the correspondence, and the dissent of two members of the court below with respect to the guest registrations.

The argument was made below that the lists of names and the correspondence *might* reveal something "subversive" despite the appellant's disclaimer under oath (R. 103). That would have been equally true in *Sweezy*. However, a greater likelihood of such results must exist in order to justify an interference with First Amendment rights. There was no showing of pertinency in the proposed disclosure of the names of members of the public who became paying guests at World Fellowship, or in the proposed examination of private correspondence with guest lec-

turers. Indeed appellee has admitted that the correspondence would not advocate overthrow of the government * (R. 44). The state court's reliance upon *United States* v. *Orman*, 207 F. 2d 148 (C. A. 3, 195), overlooks the absence therein of the counter-balancing rights of privacy and political association. Such rights were involved in *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, where this Court noted that "compelled disclosure of affiliation with groups engaged in advocacy may constitute * * * a restraint on freedom of association", there citing the concurring opinion in *Sweezy* that the "subordinating interest of a state must be compelling" and concluded that Alabama "has fallen short of showing a controlling justification for the deterrent effect which disclosure of membership lists is likely to have." These observations are equally true in the instant case.

Free association and discussion of public issues is as necessary in summer adult educational centers and camps as in academic institutions, such as that involved in *Sweezy*. Indeed, *Sweezy* involved a state institution over which New Hampshire had special supervisory power. *Cf. Adler* v. *Board of Education*, 342 U. S. 485. A private institution is entitled to even greater immunity from governmental supervision.

New Hampshire sought in the 1951 statute and the implementing resolutions to interfere with associations admittedly lawful. This Court commented in *Sweezy* upon the breadth of the 1951 statute's definition of "subversive persons" and "subversive organizations." Noting that the State Supreme Court had held that the former encompasses persons engaged in the specific conduct "* * * whether or not done 'knowingly and wilfully * * *', *Nelson* v. *Wyman*, 99 N. H. 33, 39," it added: "The potential sweep of this definition extends to conduct which is only remotely related

* While in appellee's view, *infra*, pages 14-15, pacifism may be equivalent to subversion, it is certainly the antithesis of the forcible overthrow of the government which, at most, was the subject under investigation.

to actual subversion and which is done completely free of any conscious intent to be a part of such activity" *Sweezy* v. *New Hampshire*, 354 U. S. 234, 246-247,

It is this statute which the Attorney General was enforcing upon instructions "to find out if there were subversive persons, as defined in that Act, present in New Hampshire" (see *Sweezy, supra*, p. 246). That was his admitted reason for seeking the lists of guests herein. He expressly claimed the right "to find out who in this state are members of subversive organizations even if they do not know them to be subversive organizations, even if they are not criminal" (R. 35). But New Hampshire cannot impose upon appellant the sanction of compulsion to testify solely because he has had innocent associations of the kind involved.

Nor, if appellant's testimony had revealed the names of "subversive" persons, as defined in the 1951 Act, could the State have imposed sanctions upon them. Quite aside from the invalidity under *Pennsylvania* v. *Nelson, supra*, of any state sedition law, sanctions imposed upon innocent conduct in the amorphous class referred to in the 1951 Act would deny due process because of vagueness, *Watkins* v. *United States*, 354 U. S. 178, would interfere with the right of association, *Wieman* v. *Updegraff*, 344 U. S. 183, and would be a bill of attainder. Constitution, Article I, § 10. If the sanctions included interference with the right of appellant's guests and other non-residents to enter the state as visitors and reside therein, it would interfere with their liberty of movement. *Edwards* v. *California*, 314 U. S. 160; *Kent and Briehl* v. *Dulles*, 357 U. S. 116.

Appellee has admitted an intent to affect free discussion: "It is of course obvious that Mr. Uphaus isn't going to write someone and ask them to come and make a speech about overthrowing the government by force and violence. At the same time the advocacy of a doctrine that we lay down our arms in favor of a few sticks and stones and

paving the way for the coming of the Soviet Union is just as much an advocacy of the overthrow of government * * * " (R. 44, see also R. 46). This admission clearly supports the dissent below when, anticipating this Courts' decision in *Watkins* v. *United States*, 354 U. S. 178, it pointed out: "The order of this Court will operate as a deterrent upon the right of free speech and peaceable assembly guaranteed by the Constitution" (R. 108).

The dissenting judges below were concerned exclusively with the protection of the guests, citing *Rumely* v. *United States*, 197 F. 2d 166, 172, affirmed *sub nom United States* v. *Rumely*, 345 U. S. 41. However, the guest speakers have not surrendered their right of privacy and of association because they have spoken out on public issues. See *Sweezy* v. *New Hampshire*, 354 U. S. 234.

II

The resolution authorizing the Attorney General's investigation was too vague to establish legislative purpose, to protect appellant and to afford him due process.

In *Sweezy* v. *New Hampshire*, 354 U. S. 234, four members of this Court concluded that the 1953 resolution was too vague to indicate the precise scope of the investigation contemplated by the legislature. The opinion of the Chief Justice pointed out that a legislative investigation carries with it the responsibility "of adequate supervision of the actions of the Committee" 354 U. S. 234, 245. The opinion noted that, in the absence of such clear authority and continuing supervision, appellee's investigation might impinge upon constitutional liberties. This, in the view of four justices, was a denial of due process. The methods pursued by appellee in the instant case confirm the cogency of these observations.

The State Court upon remand from this court expressed its disagreement with the Chief Justice's opinion in the *Sweezy* case, stating that in its view the legislature did desire information of the kind involved herein. The State Court relied upon a recent legislative resolution, N. H. Laws, 1957, c. 347, approved July 11, 1957, the substance of which is set forth in a footnote,* with respect to which it said: "The legislative history makes it clear beyond a reasonable doubt that it would and does desire an answer to these questions."

The same point was made by the Attorney General in his petition for rehearing in this Court in the *Sweezy* case. That petition was denied by this Court, 355 US 852 (R. 129). Since the resolution refers exclusively to *Sweezy*, it affords even less support to the Attorney General in the present case. In any event, legislative intent in 1953 cannot be proven by a legislative enactment, *post litem motam*, in 1957. At most the latter resolution is an admission of the vagueness of the earlier one under which appellant was investigated.

---

* "That this general court is, and for a long time has been, familiar with the questions put to Paul M. Sweezy by the attorney general acting in this state, authorized these questions, wanted and continues to want the information which is sought by these questions, and has enacted this resolution for the specific purpose of removing the doubt which has been expressed by the United States Supreme Court ' . . . neither we nor the State Courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the Legislature wanted to be informed when it initiated this inquiry'."

III

The State's power to conduct this particular investigation has been nullified by existing federal legislation.

Appellant was subpoenaed pursuant to a joint resolution authorizing the Attorney General to make an investigation "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state." (N. H. Laws 1953, Ch. 307 as extended, Laws 1955, Ch. 197, Appendix, pp. 33, 34). The joint resolution authorized the Attorney General "to make public such information received by him." It directed him "to proceed with criminal prosecution under the Subversive Activities Act whenever evidence presented to him in the course of investigation indicate violations thereof, * * * ". Finally, it provided for his report to the legislature as to "the results of this investigation, together with his recommendations, if any, for necessary legislation." *

The 1951 statute contains a finding that "there is a world Communist movement under the domination of a foreign power, having as its objective, the establishment of totalitarian dictatorship in all parts of the world under its control" (Appendix, p. 23). Other findings in that statute set forth the detailed techniques employed to accomplish that objective. Thereafter, the statute defines subversive organizations and subversive persons as those who by certain specific means seek "the overthrow, destruction or alteration of, the constitutional form of the government of the United States or of the State of New Hampshire or of any political subdivision of either of them by force or violence" (*id.* at pp. 24-25).

---

* The "necessary legislation" as the dissenting opinion below notes would be based upon the discovery of such "subversive persons" in the state. R. 106.

It is plain from the foregoing that this statute is not limited to purely local matters. (See *Commonwealth* v. *Gilbert*, 334 Mass. 71, 134 N. E. 2d 13; *Braden* v. *Commonwealth* (Ky.) 291 S. W. 843.) Indeed, while references are made to both the federal and state governments, the thrust of the statute is towards an alleged international conspiracy directed against this country and not against New Hampshire or any other particular state.

There is nothing in this or the *Sweezy* records in this Court, or in the opinions in the other similar New Hampshire cases, *Kahn* v. *Wyman*, 100 N. H. 245, 123 Atl. 2d 166; *Nelson* v. *Wyman*, 99 N. H. 33, 105 Atl. 2d 756, which would suggest that we are dealing here with a local problem. Hence, the comment of this Court in *Sweezy*: "We do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields." 354 U. S. 234, 251.

Under these circumstances, the New Hampshire Subversive Activities Act of 1951 and the resolutions based thereon are superseded by the Smith Act as amended, 18 U. S. C. § 2835, and other federal sedition laws. Under this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497:

> "The conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a Congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore a state sedition statute is superseded regardless of whether it purports to supplement the federal law."

Nelson involved a state sedition law. The same principle should apply to any state investigation of the same subject. For such an investigation can be justified constitutionally only if it could result in valid legislation. This is not possible under the rule of *Nelson*.

However, that general problem as to the validity of state sedition investigation need not be resolved herein. In the present case the investigation of appellant is based upon the state's sedition law. The Attorney General's functions are limited to determining whether that statute has been violated and "whether subversive persons as defined in said Act" are located within the State of New Hampshire. If that sedition law is invalid under the *Nelson* case, the investigation which is intended to enforce and implement it is equally so.

IV

The indefinite sentence below constitutes such cruel and unusual punishment as to violate the Eighth and Fourteenth Amendments.

This is not the ordinary case of commitment until a contemnor has complied with a judicial order. The unusual complex of circumstances herein suggests that the indefinite sentence here imposed constitutes such cruel and unusual punishment as to be a denial of due process.

Appellant answered every question as to his own conduct and his own political views. He was not actuated by self-interest or disrespect for the judicial process.

His uncontroverted statement, from which we quote briefly, indicates his motivation:

> "I have been moved first by my religious convictions, by my inner conscience, by the direct teachings of the Bible that it is wrong to bear false witness against my brother; and in as much as I have no reason to believe that any of these persons whose names have been called for have in any sense hurt this state or our country, I have reason to believe that they should not be in the possession of the Attorney General. In the next place, the social teachings of the Methodist Church teach us clearly and specifically that we in the United States should stand up and uphold civil

and religious rights; and in particular, it condemns guilt by association, and my counsels have made the point that that is the crux of the question. Next, Your Honor, I hold before me here this precious Bill of Rights to which reference has been made. I have grown up under that. I have for years been nurtured under that. I believe in it. I am a son of American soil and I love my country; and I love this document and I propose to uphold it with the full strength and power of my spirit and intelligence." (R. 14)

Appellee himself stated: "I know and I respect Mr. Uphaus' disinclination to be an informer" (R. 19).

It was these principles which led appellant to refuse to give the names of the maintenance employees at his camp whom he described as ordinary working men whose politics were unknown to him (R. 50, 51). In this he was sustained by the trial court (R. 51, 72).

Then they led him to decline to give his private correspondence with the various persons who were to give lectures at the camp. To permit the Attorney General to rifle through such private correspondence and to make it the subject of a public report to the New Hampshire legislature and the people of New Hampshire would certainly have embarrassed many innocent people. It was on this point that the trial court had such grave doubts that it referred the matter to the appellate court (R. 2, 88).

Finally, appellant declined to reveal the names of several hundred guests, principally from out of the state, and many of whom may have registered as a result of an open invitation by wayside signs, who, too, might well have been subjected to public obloquy by the exposure of their names in a report by the Attorney General (R. 97). The injury that might be inflicted on them is indicated by the fact that the Attorneys General of thirty-seven states keep a cross-index file of names appearing in such investigations (R. 7). Innocent persons returning home might find themselves

haled before their own Attorney General. On this point it will be recalled, two members of the Court below agreeing with appellant, denied the existence of a "public necessity for production of the registrations as to warrant the abridgement of the privilege of the individual's concern to exercise their civil liberties free from threatened involvement and the legislative investigation of subversive persons" (R. 109).

It is obvious that appellant was motivated by very strong conscientious principles against injuring other persons. The moral justification for not being an informer are too well known to require recitation here. It is enough to call this Court's attention to the recent action of New York State's Commissioner of Education requiring the New York Board of Education to retain school teachers who refused to be informers (*Matter of Adler*, Decision No. 6199, aff'd *Matter of Board of Education of the City of New York, etc.* v. *Allen, et al.*, 6 Misc. 2d 453, aff'd (App. Div. 3d) 173 N. Y. S. 2d —.

It may be proper in commercial and similar litigation, particularly where private rights of parties are involved, to commit a contemnor until he complies with a judicial order. It cannot be proper to provide for such indefinite commitment where, as here, the right of the individual conscience is counterpoised against the right of the state. The state is entitled to use all reasonable measures to compel compliance with its lawful orders but it would be "repugnant to the conscience of mankind", *Palko* v. *State of Connecticut*, 302 U. S. at 323, to employ the sanction of permanent imprisonment because the appellant will not surrender his conscientious principles.

Neither the federal government nor any state government other than New Hampshire has found it desirable or necessary to make indeterminate commitments in the course of investigations of political associations. *Cf. United States* v. *Field*, 193 F. 2d 92, cert. den. 342 U. S. 894; *United States* v. *Patterson*, 219 F. 2d 659; *Ullman* v. *United*

States, 350 U. S. 422, rehearing denied 351 U. S. 928; *State* v. *Raley*, 164 Ohio St. 529, 133 N. E. (2d) 104, judgment vacated, — U. S. — ; *Yates* v. *United States*, 227 F. 2d 844, remanded 355 U. S. 66, upon which the court below relied, is now a decision in the opposite direction in view of this Court's latest decision therein. 356 U. S. 363, vacating judgment in 252 F. 2d 568.

Such a sanction is certainly "cruel and inhuman punishment" under the Eighth Amendment. It would render the judgment below invalid if *Adamson* v. *California*, 332 U. S. 46, were to be reconsidered. But in any event the sanction must fall before the mandate of the Fourteenth Amendment as "inhuman and barbarous", In re *Kemmler*, 136 U. S. 436, 447. Permanent imprisonment until one is prepared to subordinate his religious principles to the state and to injure innocent persons does not meet the due process clauses of "demand for civilized standards". See Mr. Justice Frankfurter concurring in *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 468.

CONCLUSION

The decision of the New Hampshire Supreme Court should be reversed with instructions to dismiss the proceedings.

Respectfully submitted,

ROYAL W. FRANCE,
154 Nassau Street,
New York 37, New York,

HUGH H. BOWNES,
Laconia, New Hampshire,

Attorneys for Appellant.

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
25 Broad Street,
New York 4, New York,
of Counsel.

August 1958.

Appendix

(Laws of New Hampshire 1951)

CHAPTER 193

An Act Relative to Subversive Activities

Whereas, there is a World Communist movement under the domination of a foreign power, having as its objective the establishment of totalitarian dictatorship in all parts of the world under its control; and

Whereas, such dictatorship is characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly, and freedom of religion, and is the complete antithesis of the American constitutional form of government; and

Whereas, the methods used by such a police state include treachery, deceit, infiltration into governmental and other institutions, espionage, sabotage, terrorism and other unlawful means; and

Whereas, the World Communist movement is not a political movement, but is a world-wide conspiracy having sections in each country; and

Whereas, using the methods above set forth, it has already successfully conquered in recent years a large part of the world and has established spearheads in this country in the form of various conspiratorial organizations, some masquerading under the pretense of being political parties, others infiltrating organizations which they seek to control in order to further the objectives of the World Communist movement; and

Whereas, the subversive groups have had similar objectives and it is essential to the preservation of the state,

as well as for the protection of citizens from unfounded accusations, that criminal acts of a seditious nature be clearly and expressly defined; and

WHEREAS, the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the state of New Hampshire or any of its political subdivisions be definitely established, not only for protection of governmental processes but in order to shield employees from unfounded accusations of disloyalty; therefore

Be it enacted by the Senate and House of Representatives in General Court convened:

1. *Subversive Activities.* Amend the Revised Laws by adding after chapter 457 the following new chapter:

CHAPTER 457-A

SUBVERSIVE ACTIVITIES

1. *Definitions.* For the purposes of this chapter "organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or of any political subdivision of either of them, by force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of government of, the United States, or of the state of New Hampshire, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the *bona fide* purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

SEDITION

2. *Felonies.* It shall be a felony for any person knowingly and wilfully to

(a) commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to

assist in the overthrow, destruction or alteration of, the constitutional form of the government, of the United States, or the state of New Hampshire, or any political subdivision of either of them, by force or violence; or

(b) advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the state of New Hampshire or of any political subdivision of either of them; or

(c) conspire with one or more persons to commit any such act; or

(d) assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) destroy any books, records or files, or secrete any funds in this state of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars or imprisoned for not more than twenty years, or both, at the discretion of the court.

3. *Penalty.* It shall be a felony for any person after August 1, 1951, to become, or after November 1, 1951 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars, or imprisoned for not more than five years, or both, at the discretion of the court.

4. *Barred from Office.* Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of sections 2 and 3 of this chapter, in addition to all other penalties therein provided, shall from the date of such conviction be barred from

(a) holding any office, elective or appointive, or any other position of profit or trust in or employment by the government of the state of New Hampshire or any agency thereof or of any county, municipal corporation or other political subdivision of said state;

(b) filing or standing for election to any public office in the state of New Hampshire.

5. *Dissolution of Organizations.* It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the state of New Hampshire and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the state of New Hampshire, a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited, and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the state of New Hampshire, the funds to be deposited in the state treasury and the books, records, files and other property to be turned over to the attorney general of New Hampshire.

6. *Assistance Furnished.* For the collection of any evidence and information referred to in this chapter, the attorney general is hereby directed to call upon the superintendent of state police, and county and municipal police authorities of the state to furnish him such assistance as may from time to time be required. Such police authorities

are directed to furnish information and assistance as may be from time to time so requested. The attorney general may testify before any grand jury as to matters referred to in this chapter as to which he may have information.

7. *Records.* The attorney general shall maintain complete records of all information received by him and all matters handled by him under the requirements of this chapter. Such records as may reflect on the loyalty of any resident of this state shall not be made public nor divulged to any person except with the permissions of the attorney general to effectuate the purposes hereof.

8. *Grand Jury Inquiries.* The superior court, when in its discretion it appears appropriate or when informed by the county solicitor that there is information or evidence of the character described in section 2 of this chapter to be considered by the grand jury, shall charge the grand jury to inquire into violations of this chapter for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons.

LOYALTY

9. *Employment.* No subversive person, as defined in this chapter, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this state, or of any county, municipality, or other political subdivision of this state.

10. *Written Statements Required.* Every person and every board, commission, council, department, court or other agency of the state of New Hampshire or any political subdivision thereof, who or which appoints or employs or

supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this state, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be, shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquires as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

11. *Exceptions.* The inquiries prescribed in section 10 other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule and regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this chapter will not be dangerous to the health of the citizens or the security of the government of the United States, the state of New Hampshire or any political subdivision thereof.

12. *Present Employees.* Every person, who on August 1, 1951 shall be in the employ of the state of New Hampshire or of any political subdivision thereof, other than those now holding elective office shall be required on or before October 1, 1951 to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this chapter, namely, any person who commits,

attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this chapter such statement shall be prepared and execution required by every person and every board, commission, council, department, court, or other agency of the state of New Hampshire or any political subdivision thereof responsible for the supervision of employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this chapter shall immediately be discharged.

13. *Discharge of Personnel; Hearing.* Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this chapter shall be cause for discharge from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any county, municipality or other political subdivision of this state, or any agency thereof. The personnel commission shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this chapter, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the state of New Hampshire or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the state classified service shall establish rules

or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this chapter after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this chapter shall promptly report to the attorney general the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right within thirty days thereafter to appeal to the superior court of the county where such person may reside for a determination by such court (with the aid of a jury if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this act. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the supreme court of New Hampshire as in civil cases.

14. *Declarations of Candidates.* No person shall become a candidate for election to, nor qualify for, any public office under the election laws of this state unless he or she shall file with the declaration of candidacy, or prior to qualifying, an affidavit that he or she is not a subversive person as defined in this chapter. No declaration of candidacy shall be received for filing by any town or city clerk or by the secretary of state unless accompanied by the affidavit aforesaid and there shall not be entered upon any ballot or voting machine at any election the name of the person who has failed or refused to make the affidavit aforesaid. (As amended by L. H. Laws 1953, Ch. 180.)

15. *False Statements.* Every written statement made pursuant to this chapter by an applicant for appointment or employment, or by any employee shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a

material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this chapter, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions, pursuant to this chapter, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this chapter, which statement contains notice that it is subject to the penalties of perjury shall be subject to the penalties of perjury prescribed in chapter 457 of the Revised Laws.

16. *Separability.* If any provision, phrase, or clause of this chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this chapter which can be given effect without the invalid provision, phrase, or clause or application and to this end the provisions, phrases and clauses of this chapter are declared to be severable.

17. *Title.* This chapter may be cited as the Subversive Activities Act of 1951.

This act shall take effect August 1, 1951.

(Approved August 1, 1951.)

(New Hampshire Laws, 1953)

JOINT RESOLUTION RELATING TO THE INVESTIGATION OF SUBVERSIVE ACTIVITIES

Resolved by the Senate and House of Representatives in General Court convened:

That the attorney general is hereby authorized and directed to make full and complete investigation with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said act are presently located within this state. The attorney general is authorized to act upon his own motion and upon such information as in his judgment may be reasonable or reliable. He may authorize any member of his staff to conduct on his behalf any part of the investigation herein provided for and in such event and for such purposes any member so authorized shall have all of the powers herein granted to the attorney general.

For the purposes of this resolution, the attorney general or any duly authorized member of his staff is authorized to sit and act at such times and places during this session of the 1953 legislature, recess and adjourned periods, and to employ such attorneys, experts, clerical and other assistance as may be required, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, and to administer such oaths, to take such testimony and to make such expenditures within the limitations authorized herein as he deems advisable. The provisions of section 7 of chapter 193 of the Laws of 1951 shall be inapplicable to the investigation provided for herein, and the attorney general is hereby authorized to make public such information received by him, testimony given before him, and matters handled by him as he deems fit to effectuate the purposes of this resolution.

The attorney general is directed to proceed with criminal prosecutions under the subversive activities act whenever evidence presented to him in the course of the investigation indicates violations thereof, and he shall report to the 1955 session on the first day of its regular session the results of this investigation, together with his recommendations, if any, for necessary legislation. There is hereby appropriated for the expenses of this investigation the sum of ten thousand dollars which shall include the cost of printing such report as is provided for by this resolution and shall be expended under the direction of the attorney general, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws. The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

[Approved Jun 17, 1953.]

CHAPTER 197.

AN ACT RELATIVE TO INVESTIGATION OF SUBVERSIVE ACTIVITIES.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. SUBVERSIVE INVESTIGATION. The investigation of subversive activities by the attorney general provided for by chapter 307 of the Laws of 1953, as continued by a resolution approved January 13, 1955, is hereby continued in full force and effect, in form, manner and authority as therein provided for the further period until June 30, 1957. The attorney general shall report to the general court of 1957 the results of this further investigation together with his recommendations, if any, for necessary legislation. He may at any time during said period temporarily or permanently conclude his investigation hereunder if, in his opinion, no useful public purpose would be served by continuation of the investigation. There is hereby appropriated for the expenses of this continued investigation a sum not to exceed forty-two thousand five hundred dollars, which shall include the cost of printing such report as is provided for hereby, but nothing herein contained shall limit the power of the attorney general to act in cases of reasonable necessity under the provisions of section 11 of chapter 24 of the Revised Laws (section 12, chapter 7, RSA). The governor is hereby authorized to draw his warrants for the sum hereby appropriated out of any money in the treasury not otherwise appropriated.

2. TAKES EFFECT. This act shall take effect upon its passage.

[Approved June 14, 1955.]